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No. 85-2103

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term 1986

UTILITY CONTRACTORS, INC.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PETER J. O'LOUGHLIN
2000 Post Oak Blvd., Suite 1760
Houston, Texas 77056
Telephone: (713) 626-5051

Attorney for Petitioner

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The argument set forth in the Memorandum of Opposition raises issues, which necessitates a Reply thereto.

1. On Design Warranty Questions

The Government's Memorandum does not mention the required transition section and filter material, the water velocities or other factors in this case. As with the Trial Court opinion, it barely mentions that the claim of Utility Contractors, Inc. ("Utility") is for damage to concrete. The Memorandum and the Trial Court opinion, by their omissions, vagueness, conclusory nature and language, seek to cast everything as if it were pure flood damage to non-concrete permanent work. Both sides in fact foresaw the latter damage, as to which the

contract provisions had risk-allocating effect.

In the same vein, the Memorandum (as the Trial Court opinion) engages in no discussion of facts or explanation of why the contractor should be held to greater knowledge and foresight as to effects of the design than the Government's own expert designers. Utility's experience included having performed over $200 million of public-contract heavy-construction work in its history since the 1950's, and it was performing $25 million per annum of such work in the peak 1979-1980 period (103-104). As Robert Kuhn testifies, Utility would have known if losses of concrete should be expected (88).

Utility has fully presented all its points at each juncture. The Trial Court itself initiated questions at oral

argument, on:

> (i) what the contract provisions were for (receiving answer that [as Weldon Gamel testified] they affected pure flood damage); and
>
> (ii) why the contractor hadn't asked questions about damage to concrete at pre-bid conference (receiving answer that [as Dennis Garrigues testified] when by chance one was asked, the Government's experts gave no information).[1]

Then the Trial Court omitted from its opinion its own sequence of inquiry.

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[1] (Official Transcripts of oral arguments of December 21, 1983 [pages 32-33] and August 29, 1984 [pages 29-31]). The Government's Memorandum (page 3) notes the Claims Court granted summary judgment on April 22, 1984. The actual date was April 1985, not 1984, as the Trial Court made a typographical error in the date of the Opinion when it filed it on April 22, 1985. The Government made its Motion for Summary Judgment on June 10, 1983.

Of course, if the contract provisions have the effect the Opinion contends as to damage to concrete, then it is self-contradictory to go on to consider whether the Contractor "should have known" about the losses of concrete.

While the Memorandum contends the Trial Court's decision is fact-bound, the opinion is actually extremely conclusory, without finding or stating facts, and in the few it names, takes evidence out of context and states it incorrectly. Among other examples, contrary to the opinion's assertion (8 Cl. Ct. 45-46; App. 11-13), (i) Utility implemented measures to prevent damage to concrete prior to the June 8, 1979 large loss, after a much smaller May 12, 1979 loss of concrete (96) and (ii) Mitchell testified about a design change to coarse-graded filter material, i.e., that it (and each of the

other changes he named) would have prevented damage to concrete, and was completely feasible. (143-144).

The Government's Memorandum, at page 3, asserts the Trial Court addressed Utility's theory of inadvertent misrepresentation. But the opinion mentioned it only on Count II of Plaintiff's Complaint, on the effect of the flood elevation (8 Cl. Ct. 53; App. 51) and not on Count I on the specifications for performing the work. Further, the opinion did not consider implied misrepresentation, i.e., arising from implication from incomplete information. For authority indicating the expansive nature of circumstances and indications which with omissions, make such implied, inadvertent misrepresentations, Utility cites Aerodex, Inc. v. United States, 417 F.2d 1361 (Ct. Cl. 1969).

The cases the Government Memorandum cites do not alter the authorities Utility has set out in its Petition for Certiorari, on its theories of breach of contract (and commercial impracticability), under its Count I.

2. On U.S. Claims Court

The Government's Opposition does not contest Utility's individual propositions, but is a curt general denial, as if to say that the issues are of minor importance, in the Supreme Court's workload. However, the cases in this area (especially on the status of the Court of Claims) are actually the largest, most central topic in the federal courts system per, e.g., the scheme of Hart and Wechsler The Federal Courts and the Federal System (1953) ("Hart").

Justice Sutherland's conclusion in Williams v. United States, 289 U.S. 553, 53 S. Ct. 751, 77 L.Ed. 1372 (1933) is that Article III judicial power extends only to cases in which the United States is party plaintiff or petitioner, i.e., so that thus the Court of Claims is a legislative court, not exercising judicial power under Article III. It is remarkable the Government has chosen to pick on this conclusion and case, as it has been overruled and is absolutely the most criticized in the area. The dissenting opinion in Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982) terms Justice Sutherland's conclusion "mystifying". Id., 73 L.Ed.2d 641. The plurality opinion (Justice Harlan) in Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L.Ed.2d 671, 694 (1962),

terms it outright "mistaken". Hart, at 237, characterizes the opinion as an "intellectual disaster". Utility submits that while the plurality in Northern Pipeline indeed cites Williams, the plurality's point is that Williams is just one chapter in the history of the legislative court-Article III court distinction.

Although Utility did not pose this constitutional question below, Glidden Co., supra, holds that a non-frivolous constitutional question on authority and composition of the court may be raised for the first time in the Supreme Court. In Glidden Co., petitioners also had not raised their objections below. Id., 8 L.Ed.2d 678-679.

In fact, according to the concurring and dissenting opinions in Northern Pipeline the present posture of Utility's

case will enable fuller consideration of the constitutional questions than in Northern Pipeline. Specifically, the concurring and dissenting opinions set out that there are two constitutional-issue objections, to-wit:

(i) that resolution of the proceeding may only be by an agency exercising federal judicial power under Const., Art. III (resulting, in Northern Pipeline, in invalidating 28 U.S.C. §1471 on its face, for violation of Article III); and

(ii) to exercise of a different authority conferred on the bankruptcy courts by the 1978 Act in resolution of the proceeding, i.e., (as the plurality held) as powers greater than the adjuncts approved in previous Supreme Court cases.

Northern Pipeline, 73 L.Ed.2d 627, 630-632, 634. The concurring opinion ruled only on the first objection, on

basis that decision of the second must await the exercise of such authority (i.e., which did not occur due to dismissal before disposition on the merits). The dissenting opinion also wrote that Defendant Marathon did not have standing to raise the second objection. In the instant case, as there has been an actual exercise of authority, with harm to Utility, the petitioner can (and does) pose both objections.

Further, writing on the first objection, the dissenting opinion in Northern Pipeline, also sets out that even on a public-rights matter, the Supreme Court will review (and may strike) removal of such matter to an Article I court or board.[2] Such review and striking is on

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[2] Tracing through the authorities, the dissent cites as primary basis for such striking, Murray's (contd. next page)

basis of weighing-balancing, considering Article III values, compelling legislative responsibilities, whether the removal is justified by necessity and Congress' evident reasons for removal. Northern Pipeline, 73 L.Ed.2d 638, 639, 642. The dissent writes further that important are (i) (toward upholding the validity of a legislative court) (a) presence of Article III appellate review and (b) that the subject matter is likely to be of little interest to the political branches--i.e., so as not to accumulate power and emasculate constitutional courts--and (ii) citing Palmore, supra

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2 (contd.) Lessee v. Hoboken Land & Improvement Co., 15 L.Ed. 372 (1856), Justice Vinson's dissenting opinion in National Ins. Co. v. Tidewater Co., 337 U.S. 582, 69 S. Ct. 1173, 93 L.Ed. 1556 (1949), Justice Harlan's plurality opinion in Glidden Co., supra and Palmore v. United States, 411 U.S. 389, 93 S. Ct. 1670, 36 L.Ed.2d 432 (1973).

(fn. 2), that Article III requirements are mandatory as laws of national applicability and concern are at stake. 73 L.Ed.2d 643-644.

Utility points out that in the past, the nexus for Congressional action has been just prescribing commissioners for rendering advisory opinions in the Court of Claims (an Article III court). See Glidden Co., supra, at 8 L.Ed. 2d 700 (fn. 36), citing 28 U.S.C. §2503, on such commissioners. In the instant case, Utility urges further the subject matter is of interest to a political bureaucracy, and is a long-time subject of the judicial branch and is of such national application. Therefore, even if Utility's claims were public rights matters, by Northern Pipeline dissent's weighing-balancing test they must be in an Article III trial court. The removal to

the Article I U.S. Claims Court must be stricken.

Further, Utility points out its action in the Court of Claims was not a cause that Congress created by its waiver of sovereign immunity, but rather a cause of action which Utility already possessed. United States v. Mitchell, 463 U.S. 206, 103 S. Ct. 2961, 77 L.Ed.2d 580, 590 (1983); National Ins. Co. v. Tidewater Co., supra (fn. 2), at 93 L.Ed. 1568-1569, n. 22 (Justice Jackson's plurality opinion).[3] Citing this point, and criticizing Williams, Wright thus suggests that a case under the Tucker Act

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[3] In the same vein, the unanimous opinion in Atlas Roofing Co. v. Occup. Safety Comm'm., 430 U.S. 442, 97 S. Ct. 1261, 51 L.Ed.2d 464 (1977), defines that "public rights" situations are ". . . e.g., where the Government is involved . . . under . . . (a) statute creating enforceable public rights." Id., 477.

is a "case arising under the laws of the United States" under Article III. C. Wright, The Law of Federal Courts, p. 45, n. 32 (4th ed., 1983) ("Wright").

Wright also cites further factors (listed below, also noted by Justice Harlan's plurality opinion in Glidden Co.), indicating that such a case requires judicial power under Article III, rather than Article I legislative power. Wright, 45. These include the history of the Court of Claims and the type of litigation there, examining early Supreme Court cases prior to 1923, which showed the Supreme Court's opinion that the Court of Claims was vested with Article III judicial power. They include also that upon the United States' consent to suit, U.S. District Courts exercise Article III judicial power under:

(i) the Federal Tort Claims Act, §410(a), 60 Stat. 842, 843-844 (1946) as amended, 28 U.S.C. §1346(b); and

(ii) under the Tucker Act §2, 24 Stat. 505 (1887), as amended, 28 U.S.C. §1346(a)(2) in concurrent jurisdiction over Government contract suits when the amount in controversy is less than $10,000.

Wright, 45; Glidden Co., 8 L.Ed.2d 689, 694-696.

On the second objection, if the U.S. Claims Court is an adjunct (i.e., contrary to the holding of the plurality in Northern Pipeline) then Utility cites United States v. Raddatz, 447 U.S. 667, 100 S. Ct. 2406, 65 L.Ed. 2d 424 (1980). The majority opinion there indicates that on such judge-made law as in the instant case (and in the absence of a consented-to referral), a permissible adjunct must be only a magistrate

analogous to a master or commissioner, i.e., of much lesser function and finality than a U.S. Claims Court judge. Id., 437-438. Accordingly, Utility poses both the Article III and 5th Amendment due process objections that Raddatz records are pertinent to an instance of an excessively-empowered adjunct.

Utility made its claim submission on December 5, 1980 and February 13, 1981 under the Contract Disputes Act of 1978 ("CDA"). (91) The Contracting Officer's Decision and Findings of Fact, denying such claims, was dated September 28, 1981. (91) Utility never consented to such Article I legislative court adjudication of its breach-of-contract theories (as fully stated in its claim and its Complaint). (7-26) United States v. Utah Constr. & Min. Co., 384 U.S. 394, 86 S. Ct. 1545 16 L.Ed. 2d 642

(1966) indicates sole basis for removing a claim under a Government contract from an Article III adjudicator, is the parties' consent under the contract disputes clause. Further, such consent is only for adjudication before administrative boards of agencies, of claims for equitable adjustments under contract clauses, i.e., and not such breach-of-contract claims. In addition, in this case, even if its claims had been solely for equitable adjustments, Utility took the opportunity afforded to revoke such consent, by submitting its claim under the CDA. See 41 U.S.C. Sec. 609(a) and Pub.L. 95-563, Sec. 16, 92 Stat. 2391, Sec. 16 (App. 61).

Contrary to the Government's position in its Opposition, the propriety of Article I courts and boards is a burning current issue for the Supreme Court.

Utility points to commentators' challenges (i) on constitutional grounds, (ii) on grounds of partiality and unfairness of Article I judges and agency board-members in favor of the Government, and (iii) that Article III status is necessary to attract the most highly qualified persons to serve as judges. Redish, Legislative Courts, Administrative Agencies and the Northern Pipeline Decision, 1983 DUKE L.J. 197 (1983); 1 Norton Bankruptcy Law and Practice Sec. 5.05 (Sept. 1985 Cum. Supp.), page 35.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Peter J. O'Loughlin
2000 Post Oak Blvd., Suite 1760
Houston, Texas 77056
Telephone: (713) 626-5051
Attorney for Petitioner

CERTIFICATE OF SERVICE

On September 17, 1986, I served the above on the attorneys in said action, by placing three copies thereof in a sealed envelope with postage fully prepaid, in the United States Post Office mail box in Houston, Texas, addressed as follows:

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

_____
Peter J. O'Loughlin